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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-416

JOE FRANK MATARAZZO, PETITIONER,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of the State of South Carolina is reported at 207 S. E. (2d) 93 (1974) and is set out in Appendix of Petition.

JURISDICTION

Respondents do not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I

Whether the trial court and the Supreme Court of South Carolina violated Petitioner's rights under the Fourth and Fourteenth Amendments to the United States Constitution by ruling that one (1) bag of marijuana, found in the Petitioner's mobile home, was admissible into evidence at Petitioner's trial?

II

Whether the trial court and the Supreme Court of South Carolina violated Petitioner's rights under the Fourth and Fourteenth Amendments to the United States Constitution by ruling that testimony concerning three (3) bags of marijuana, all of which had been excluded pursuant to Petitioner's pre-trial suppression motion, was properly permissible at Petitioner's trial?

STATEMENT

The Petitioner is seeking a writ of certiorari to review the judgment of the Supreme Court of South Carolina entered July 17, 1974, affirming Petitioner's conviction and sentence to hard labor for two years by the Court of General Sessions of Hampton County, South Carolina. Timely Notice of Intention to Appeal was filed with the trial court.

The Petitioner was arrested on April 30, 1973, and was indicted on June 4, 1973, along with one Willie Mays and one Russel Curl, and charged with the offense of possession of a controlled substance (marijuana) and the offense of possession of a controlled substance (marijuana) with intent to distribute same.

On June 4, 1973, the Petitioner made a pre-trial motion to suppress certain evidence in the case. That motion was granted, the following day, as to three (3) bags of mari-

juana which had been seized from the Petitioner's mobile home. The motion was denied as to a fourth bag and a smoking pipe which were also seized from Petitioner's premises.

The Petitioner was then brought to trial alone on both counts of the indictment. Both of his co-defendants chose to plead guilty at the last moment. He was convicted on both counts and, upon instruction of the trial court, the jury modified its verdict to find the Petitioner guilty of possession of a controlled substance (marijuana) with intent to distribute same. Petitioner's motions for a Judgment Notwithstanding the Verdict and for a New Trial were denied and Petitioner was sentenced to imprisonment for a period of two (2) years.

ARGUMENT

I

The trial court and the Supreme Court of South Carolina did not violate the Petitioner's rights under the Fourth and Fourteenth Amendments to the United States Constitution by ruling that one (1) bag of marijuana, found in the Petitioner's mobile home, was admissible into evidence at Petitioner's trial.

The Petition raises an issue concerning the seizure of one (1) bag of marijuana from under a couch in the living room of Petitioner's mobile home. The facts of that seizure and the search that preceded it are as follows:

The Hampton police department received information to the effect that there was a supply of marijuana on the premises of the second trailer in McGowan Trailer Park in Hampton, South Carolina. This trailer was known to the police to be occupied by the Petitioner herein, one Russel Curl, and one Willie Mays. (T.R., p. 27, line 11—p. 28, line 2.) On Thursday, April 26, 1973, the police arranged

for an undercover agent to go to this trailer and buy some marijuana. The "buy" was made and the next morning the police obtained a search warrant for Appellant's mobile home. (T.R., p. 28, lines 3-22.) That night, they sent their undercover agent back to the Petitioner's trailer to make another buy. He was told by Russel Curl that the marijuana was in the trailer but that the agent would have to wait until Willie Mays' return to make a buy. (T.R., p. 30, lines 5-25.)

The police then went to the trailer and knocked on the front door. Someone inside said, "Come in" and then opened the door for the officers. Upon entering, the officers observed a smoking pipe in the center of the living room floor (They had previously been informed that a pipe was being used for marijuana smoking in this trailer) with some eleven (11) youths gathered thereabout. There was a noticeable odor of marijuana in the room. (T.R., p. 30, line 5—p. 31, line 17—p. 35, lines 13-14—pp. 55-56.)

Immediately upon being allowed entry to the room, the officers read their search warrant to Curl. (T.R., p. 34, lines 8-9.) Contrary to the allegations on page 13 of the Petition, the record indicates that Curl was placed under arrest at this time—shortly after the pipe was seen and at the time the search warrant was read. (T.R., p. 36, lines 4-14.) The police then searched the trailer and found three (3) bags of marijuana in the bathroom and a fourth bag under the couch in the living room some 3-4 feet from the pipe. (T.R., p. 32, lines 7-24.)

Prior to trial, the Petitioner moved to suppress the pipe and all four (4) bags of marijuana seized in the course of the search. The trial court ruled that the search warrant was void, for reasons not pertinent to this Petition, and excluded the three (3) bags which had been found in the bathroom from evidence. The fourth bag, the one found

under the living room couch, was ruled to be admissible as was the pipe. (T.R., p. 8, line 24—p. 49, line 10.)

During the trial on the issues, the pipe and subsequently the bag of marijuana were admitted into evidence. On both occasions the trial court specifically asked counsel for the Petitioner if there were any objections. On both occasions, counsel for the Petitioner specifically stated that there were none. (T.R., p. 56, line 3—p. 57, line 15.)

Petitioner's contentions concerning the admissibility of this bag are twofold: (1) He contends in Question I that his rights under the Fourth and Fourteenth Amendments were violated by the trial court in allowing this bag to be introduced into evidence and by the Supreme Court of South Carolina in affirming the trial court's action (Petition, pp. 12-14); (2) In Question III, he contends that the issues raised by his first contention were properly preserved in the trial court for review by this court. (Petition, pp. 19-20.)

The Respondent, answering these contentions in reverse order, will show: (A) That by stating that he had, "no objection," to the admission of the bag into evidence, the Petitioner waived his objections thereto; and (B) That, even if the Petitioner's objections are properly preserved for review by this Court, the bag was lawfully seized in a search incidental to arrest and was properly admitted into evidence.

A. **The Petitioner has waived his objections to the admissibility of this bag of marijuana.**

The Petitioner recognizes that this Court, in *Mapp v. Ohio*, 367 U. S. 643 (1961), held that when a State criminal conviction is challenged as being constitutionally impermissible, because of the admission of evidence obtained through an illegal search and seizure, State procedural requirements concerning assertion and persistence of direct

and collateral constitutional challenges to criminal conviction must be respected.

He contends, however, that he met the South Carolina procedural requirements by raising the exclusionary rule issues in his motion to suppress, thereby making an objection at the time the evidence was offered at trial unnecessary and preserving the constitutional issues raised by his motion to suppress.

Neither the Respondent nor the Petitioner (apparently, since no cases are cited in the Petition) has been able to find authority among the various state supreme court decisions to support the Petitioner's position. Respondent has, however, found several cases which are diametrically opposed thereto.

In *Robertson v. State,* 94 Fla. 770, 114 So. 534 (1927), a Florida case, the court held that the defendant had to object at trial to the introduction of evidence that he had sought to suppress by pre-trial motion in order to preserve his objection for appeal. The Missouri Supreme Court, in *State v. Lord,* 286 S. W. (2d) 737 (1956), held that, even though the defendant had made a pre-trial motion to suppress certain evidence allegedly seized pursuant to an unlawful search and seizure, she could not, on appeal, assert that the trial court erred in admitting that evidence when she did not object to the introduction thereof at trial.

The Maryland Supreme Court, in *Martelly v. State,* 187 A. (2d) 105 (1963), and the Georgia Supreme Court, in *Smith v. State,* 116 Ga. App. 45, 156 S. E. (2d) 380 (1967), have both held that failure to object at the time evidence is offered at trial is tantamount to a withdrawal of the pre-trial motion to suppress and acts as a waiver of the rights asserted thereunder. The Georgia decision, although possibly distinguishable on the facts, is particularly interest-

ing since trial counsel for the Petitioner was a member of the Georgia Bar.

It is instructive to note that, even under the "federal rule" in this area, given the facts of the instant case, Petitioner would have been held to have waived the objections asserted in his motion to suppress.

That rule, as defined in a line of cases beginning with *Cogen v. U. S.*, 278 U. S. 221, 73 L. Ed. 275, 49 S. Ct. 118, states that, generally, the denial of a pre-trial motion to suppress particular evidence preserves the point and renders it unnecessary to object again when the evidence is offered at trial. See also, *Gouled v. U. S.*, 255 U. S. 298, 65 L. Ed. 647, 41 S. Ct. 261; *Waldron v. U. S.*, 95 App. D. C. 66, 219 F. (2d) 37.

In *Lawn v. U. S.*, 355 U. S. 339, 78 S. Ct. 111, 2 L. Ed. (2d) 321, this Court recognized that the *Cogen* rule is not one of hard and fast application. In *Lawn*, defense counsel specifically stated that he had, "no objection," to the admissibility at trial of evidence he had opposed through a pre-trial motion. He was held to have purposefully and intentionally waived the points raised in his pre-trial motion.

The Respondent contends that the Petitioner in the instant case also waived his objection—and in precisely the same manner—when he stated, in reply to the trial court's query, "No, sir, we have no objection." (T.R., p. 57, lines 12-17.) He thereby indicated that he was satisfied with the court's pre-trial ruling. This interpretation of the record is even more convincing when one remembers that the Petitioner's motion to suppress was made in the alternative. Counsel urged: (1) that the search warrant was void and all the evidence should be suppressed; or (2) that, if a consent search or a search incident to lawful arrest were found, all the evidence found outside the living room be suppressed. (T.R., p. 25, lines 7-19.)

B. **The bag of marijuana was lawfully seized in a search incident to arrest.**

Petitioner argues that the police made a general search of the premises pursuant to their search warrant. Since the warrant was void, he insists that all four (4) of the bags of marijuana should have been suppressed.

It is Respondent's position that the bag in question was seized lawfully as the product of a search incident to the arrest of Russel Curl. In support of that position, the Respondent would respectfully note: (1) that there was sufficient probable cause to arrest Russel Curl; (2) that Curl's arrest was, at least, reasonably contemporaneous with, if not before, the search; and (3) that the bag was found within the proper scope of a search incident to arrest.

1. **There was sufficient probable cause to arrest Russel Curl.**

The record indicates the following:

1. An informer had advised the police that marijuana was being kept in a mobile home occupied by the Petitioner, Russel Curl, and Willie Mays (T.R., p. 27, line 11—p. 28, line 2);

2. A police undercover agent made a "buy" of marijuana at the aforesaid premises on April 26, 1973 (T.R., p. 28, lines 3-22);

3. The same agent was told by Russel Curl on the night of the search, April 27, 1973, that marijuana was on the premises and would be available for sale shortly (T.R., p. 30, lines 5-25);

4. The police were advised that a pipe was being used to smoke the marijuana (T.R., p. 35, lines 13-14);

5. The still-warm pipe was found on the floor of the trailer with what appeared to be marijuana ashes therein (T.R., p. 34, lines 16-23);

6. A group of eleven (11) youths were massed around the pipe (T.R., p. 31, lines 13-17); and

7. There was an odor of marijuana in the room (T.R., p. 55, line 25—p. 56, line 8).

From the foregoing, it is clear that the officers had reasonable grounds to believe that marijuana was being smoked on the Petitioner's premises in violation of Section 32-1519.49(b) of the 1962 Code of Laws of South Carolina, as amended. There was, therefore, probable cause to arrest Russel Curl. His arrest was legal.

2. **Curl's arrest was reasonably contemporaneous with the search.**

The Petition raises an issue as to whether the search took place after, or prior to, the arrest of Russel Curl.

The Respondent contends that the record clearly indicates that the arrest took place shortly before the search. (T.R., p. 36, lines 4-14.) The only other reasonable interpretation of the record is that the arrest occurred, at the very latest, a matter of moments after the search began. In either event, the arrest was "reasonably contemporaneous" with the search and, since probable cause to arrest existed prior to the search (as noted above), this was a valid search incident to arrest. *People v. Simons*, 290 P. (2d) 531 (Cal., 1955); *U. S. v. Collins*, 439 F. (2d) 610 (D. C. Cir. 1971).

3. **The bag was found within the proper scope of a search incident to arrest.**

The final issue arising from this search concerns the scope thereof. The record clearly shows that the location of the bag was within the proper scope of a search incident to arrest.

The basis for the "search incident to arrest" exception to the search warrant requirement is that it is reasonable, when an arrest is made, for a policeman to expect the

arrestee to use any weapon or to destroy any incriminating evidence which is within his grasp. Searches under such circumstances are limited to the area, "into which an arrestee might reach." *Chimel v. Cal.*, 395 U. S. 752, 763, 23 L. Ed. (2d) 685, 89 S. Ct. 2034; *Cupp v. Murphy*, 412 U. S. 291, 36 L. Ed. (2d) 900, 93 S. Ct. 2000.

The undisputed testimony was that the bag was under a couch, some 3-4 feet from where the marijuana pipe lay in plain view, in a room occupied by two (2) of Petitioner's co-defendants (one of whom was actually seated on the couch) and some nine (9) other persons. Since it was reasonable for the police to expect that either of the co-defendants (or any of the other nine (9) persons, for that matter) might reach behind the couch for a weapon or to destroy evidence, the bag was properly seized pursuant to a lawful arrest. (T.R., p. 32, lines 7-24—p. 57, line 4—p. 59—p. 30, line 5—p. 31, line 17.)

II

The trial court and the Supreme Court of South Carolina did not violate the Petitioner's rights under the Fourth and Fourteenth Amendments by ruling that testimony concerning three (3) bags of marijuana, all of which had been excluded pursuant to Petitioner's pre-trial suppression motion, was properly permissible at Petitioner's trial.

During the course of direct examination by the Solicitor, Willie Mays, the Petitioner's co-defendant, testified concerning three (3) bags of marijuana that had previously been suppressed by the trial court. Counsel for the Petitioner objected on grounds that it would be a circumvention of the exclusionary rule to permit such testimony. The trial court held that the invalidity of the search warrant would not prevent the State from proving through an independent source that the marijuana was present. The objection was overruled. (T.R., p. 65, line 22—p. 68, line 17.)

At no time did defense counsel argue, as he now argues in his Petition, that the Mays' testimony was "fruit of the poisonous tree," and/or that it was not obtained from an independent source.

Later in the proceedings, Russel Curl testified, without objection by Petitioner, concerning the same three (3) bags of marijuana. (T.R., p. 82, line 24—p. 83, line 2.)

The Solicitor also attempted to question one Grady Layton, the last State witness, concerning the suppressed evidence. Defense counsel objected: (1) on the basis that the exclusionary rule was being circumvented; and (2) on the basis that the testimony was "fruit of the poisonous tree." Counsel also moved for a mistrial on the same grounds. The trial court indicated that it was going to sustain the objection and the Solicitor agreed to withdraw the question. The motion for mistrial was denied. (T.R., p. 94, line 2—p. 98, line 10.)

The Petitioner argues that the action of the trial court in allowing Mays' and Layton's testimony and the affirmance by the Supreme Court of South Carolina violated his rights to due process and equal protection as guaranteed by the Fourth and Fourteenth Amendments and had the effect of nullifying the exclusionary rule as stated in *Mapp v. Ohio,* 367 U. S. 643 (1961) and "expanded" by the poisonous tree doctrine" of *Wong Sun v. U. S.,* 371 U. S. 471 (1963). (Petition, pp. 15-16.)

Although the Petition merely mentions, without discussing, the testimony of Grady Layton, Respondent will treat that testimony separately from the Mays' testimony.

A. **The testimony of Willie Mays.**

Respondent contends that, for both procedural and substantive reasons, Petitioner's constitutional rights have not been violated and he is not entitled to have his Petition granted.

1. **Procedural reasons.**

As noted in the discussion under Respondent's Question I, this Court, in *Mapp, supra,* recognized that, in preserving constitutional questions for review by this Court, State procedural requirements must be respected. The Petitioner in the instant case failed to respect those requirements in three particulars:

First, as to the testimony of Willie Mays, Petitioner never raised the issue that the testimony was fruit of the poisonous tree. Instead, he simply argued that testimony of this sort circumvented the exclusionary rule. The Court overruled his objections on that ground and held that the testimony fell under the "independent source" limitation to the exclusionary rule and was therefore admissible. Respondent contends that if Petitioner was aware of another theory under which the testimony could be excluded, it was incumbent upon him to advance that theory so that the trial court could rule thereon. Then, Petitioner could have appealed from an adverse ruling. In the instant case, this particular point was never ruled on by the trial court. It cannot therefore be properly asserted in the Petition. *Bailey v. Anderson,* 326 U. S. 203, 66 S. Ct. 66, 90 L. Ed. 3; *Jennings v. State of Illinois,* 342 U. S. 104, 72 S. Ct. 123, 96 L. Ed. 1539.

Secondly, the Petitioner failed to preserve his objection before cross examining Willie Mays at length on the same subject matter to which his objection was addressed. Under South Carolina law, such failure constitutes a waiver of the objection. *Goudelock v. Prudential Insurance Company,* 219 S. C. 284, 65 S. C. (2d) 114; *State v. Quillien,* .... S. C. ...., 207 S. E. (2d) 814.

Finally, Respondent would respectfully point out that any error by the trial court in permitting the Mays' testimony was cured by the fact that Russel Curl, subsequently

was allowed to testify to the same thing without objection on the part of the Petitioner.

Respondent believes that, for reasons cited above, the Petitioner did not meet the state's procedural requirements. The isues he raises in his Petition are not properly before this Court for review.

2. **Substantive reasons.**

There are also cogent and compelling substantive reasons why Petitioner is not entitled to a grant of Certiorari on the basis of Willie Mays' testimony.

Respondent contends that Mays' testimony was not "fruit of the poisonous tree." Instead, it fits under one of the recognized exception's to the exclusionary rule—the so-called "independent source" limitation.

This Court recognized, in *Silverthorne Lumber Company v. United States,* 251 U. S. 385, 40 S. Ct. 182, that facts learned as a result of information obtained in an illegal search and seizure do not become sacred and inaccessible by reason of such illegality. When knowledge of them is gained from an independent source, they may be proven like any others. The "independent source" rule was later somewhat expanded by the ruling in *Nardone v. United States,* 308 U. S. 338, 84 L. Ed. 307, 60 S. Ct. 266. That case held that, when the connection between the challenged evidence and the primary illegality is so long or tenuous that it can only be shown by sophisticated argument, the evidence is admissible since its exclusion would have no deterrent effect on the police.

The *Silverthorne* and *Nardone* rules mean, in the context of the instant case, that Mays' testimony would be admissible if: (1) there was no causal connection between the illegal search and that testimony; or (2) the causal connection was so attenuated that it could only be shown by sophisticated argument.

Respondent contends that there was no causal connection between the illegal search and the testimony. The record clearly supports that contention. It is obvious that the police knew of Willie Mays and had enough evidence to justify his arrest at a point in time prior to the illegal search.

Prior to that search, the police:

(a) knew that Mays, Curl, and the Petitioner lived together in a mobile home (T.R., p. 27, line 18—p. 28, line 2);

(b) had been informed that marijuana was present on the premises (T.R., p. 27, line 18—p. 28, line 2);

(c) had sent an undercover agent who made a "buy" from Mays on the premises (T.R., p. 28, lines 3-11); and

(d) knew that Curl had told the same agent that there was marijuana present in the trailer and that Mays would sell it.

Furthermore, Mays was sitting literally on top of the bag of marijuana that was seized incident to a lawful arrest. (T.R., p. 59, lines 8-21.)

It is clear therefore that the only way that the illegal search and the testimony could be linked is through "sophisticated argument" of the type discussed in *Nardone*. Under the rule in that case, Mays' testimony would still be admissible.

B. **The Testimony of Grady Layton.**

In reference to Layton's testimony, the Petitioner argues that: (1) his objection thereto should have been sustained; and (2) his motion for mistrial should have been granted.

As to Petitioner's objection, Respondent would simply point out that it was, in fact, sustained. The trial court ruled the question out of order and the Solicitor withdrew it. (T.R., p. 94, line 2—p. 98, line 10.) As a result, there is no adverse ruling by the trial court for this Court to review.

As to Petitioner's motion for a mistrial, it is clear that it was properly denied. Layton was the final State witness. Prior to his testimony, both Mays and Curl had testified, without proper objection, to the fact that there were four (4) bags of marijuana in the trailer. There was no request for precautionary instruction to the jury with respect to the objection made to the testimony of Layton and sustained by the Court, and there was no motion to strike any of the testimony as to the four (4) bags of marijuana.

CONCLUSION

For the foregoing reasons, Respondents submit that Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DANIEL R. McLEOD,
Attorney General,

C. TOLBERT GOOLSBY, JR.,
Deputy Attorney General,

JOSEPH R. BARKER,
Assistant Attorney General.